EC-G-1999-012

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 31 1987

OFFICE OF GENERAL COUNSEL

MEMORANDUM

SUBJECT: Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)

FROM: Francis S. Blake
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TO: J. Winston Porter
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for Solid Waste and Emergency Response (WH-562A)

One critical and recurring issue arising in the context of Superfund response activities has been the scope of the petroleum exclusion under CERCLA. Specifically, you have asked whether used oil which is contaminated by hazardous substances is considered "petroleum" under CERCLA and thus excluded from CERCLA response authority and liability unless specifically listed under RCRA or some other statute. For the reasons discussed below, we believe that the contaminants present in used oil or any other petroleum substance are not within the petroleum exclusion. "Contaminants", as discussed below, are substances not normally found in refined petroleum fractions or present at levels which exceed those normally found in such fractions. If these contaminants are CERCLA hazardous substances, they are subject to CERCLA response authority and liability.

Background

Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended (CERCLA), governmental response authority, release notification requirements, and liability are largely tied to a release of a "hazardous substance." Section 104 authorizes government response to releases or threatened releases of hazardous substances, or "pollutants or contaminants." Similarly, liability for response costs and damages under Section 107 attaches to persons who generate, transport or

Received
JAN 28 2000
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dispose of hazardous substances at a site from which there is a release or threatened release of such substances. Under Section 103, a release of a reportable quantity of a hazardous substance triggers notification to the National Response Center.

The term "hazardous substance" is defined under CERCLA Section 101(14) to include approximately 714 toxic substances listed under four other environmental statutes, including RCRA. Both the definition of hazardous substance and the definition of "pollutant or contaminant" under Section 104(a)(2) exclude "petroleum, including crude oil or any fraction thereof", unless specifically listed under those statutes. 1/ Accordingly, no petroleum substance, including used oil, can be a "hazardous substance" except to the extent it is listed as a hazardous waste under RCRA or under one of the other statutes. Thus two critical issues in assessing whether a substance is subject to CERCLA is whether or not, and to what extent, a substance is "petroleum." This memorandum discusses the second type of petroleum exclusion issue. The question, therefore, is not whether used oil is "petroleum" and thus exempted from CERCLA jurisdiction, but to what extent substances found in used oil which are not found in crude oil or refined petroleum fractions are also "petroleum". If such substances are not "petroleum" then a release of used oil containing such substances may trigger CERCLA response actions, not to the release of used oil, but to the contaminants present in the oil.

1/ The full texts of these provisions are as follows:

Section 101(14)

. . . .

The term [hazardous substance] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Section 104 (a)(2)

. . . .

The term [pollutant or contaminant] does not include petroleum, including crude oil and any fraction thereof which is not otherwise specifically listed or designated as hazardous substances under section 101(14)(A) through (F) of this title, nor does it include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

Although the term "hazardous substance" is defined by statute, there is no CERCLA definition of "petroleum" and very little direct legislative history explaining the purpose or intended scope of this exclusion. None of the four early Superfund bills originally excluded responses to oil, although the apparent precursor to Section 101(14), found in S. 1480, excluded "petroleum" without explanation in all versions except that introduced. The legislative debates on the final compromise indicate only that Congress intended to enact later, separate superfund-type legislation to cover "oil spills." See generally 126 Cong. Rec. H11793-11802 (December 3, 1980).

Since the enactment of CERCLA, the Agency has provided some interpretations of the nature and scope of the petroleum exclusion. In providing guidance in 1981 on the notification required under Section 103 for non-RCRA hazardous waste sites the Agency stated that petroleum wastes, including waste oil, which are not specifically listed under RCRA are excluded from the definition of "hazardous substance" under 101(14). 46 Fed. Reg. 22145 (April 15, 1981). 2/

In 1982 and in 1983, the General Counsel issued two opinions on the CERCLA petroleum exclusion. In the first opinion, the General Counsel distinguished under the petroleum exclusion between hazardous substances which are inherent in petroleum, such as benzene, and hazardous substances which are added to or mixed with petroleum products. The General Counsel concluded that the petroleum exclusion includes those hazardous substances which are inherent in petroleum but not those added to or mixed with petroleum products. Thus, the exclusion of diesel oil as "petroleum" includes its hazardous substance constituents, such as benzene and toulene, but PCB's mixed with oil would not be excluded. Moreover, if the petroleum product and an added hazardous substance are so commingled that, as a practical matter, they cannot be separated, then the entire oil spill is subject to CERCLA response authority.

In the second opinion, the General Counsel concluded that the petroleum exclusion as applied to crude oil "fractions" includes blended gasoline as well as raw gasoline, even though refined or blended gasoline contains higher levels of hazardous

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2/ In the notice the Agency used the term "waste oil" without stating whether it was intended to include all waste oil or only unadulterated waste oil. The Agency has subsequently interpreted the reference to "waste oil" in this notice to include only unadulterated waste oil. 50 Fed. Reg. 13460 (April 4, 1985).

substances. The increased level of hazardous substances results from the blending of raw gasoline with other petroleum fractions to increase its octane levels. Because virtually all gasoline which leaves the refinery is blended gasoline, the petroleum exclusion would include virtually none of this fraction if the increased concentration of hazardous substances due only to its processing made it subject to CERCLA.

Finally, the Agency has interpreted the petroleum exclusion in two recent Federal Register notices. In the April 4, 1985 final rule adjusting reportable quantities under Section 102, the Agency provided its general interpretation of the exclusion:

> EPA interprets the petroleum exclusion to apply to materials such as crude oil, petroleum feedstocks, and refined petroleum products, even if a specifically listed or designated hazardous substance is present in such products. However, EPA does not consider materials such as waste oil to which listed CERCLA substances have been added to be within the petroleum exclusion. Similarly, pesticides are not within the petroleum exclusion, even though the active ingredients of the pesticide may be contained in a petroleum distillate: when an RQ of a listed pesticide is released, the release must be reported.

50 Fed. Reg. 13460 (April 4, 1985).

In March 10, 1986, the Agency published a notice of data availability and request for comments on the proposed used oil listing under RCRA. 51 Fed. Reg. 8206. In that notice, the Agency responded to commenters who had argued that the RCRA listing would discourage used oil recycling because it would subject generators, transporters, processors, and users to Superfund liability. The Agency stated that used oil which contains hazardous substances at levels which exceed those normally found in petroleum are currently subject to CERCLA. 51 Fed. Reg. 8206 (March 10, 1986). Although the fact that the used oil is contaminated does not remove it from the protection of the petroleum exclusion, the contaminants in the used oil are subject to CERCLA response authority if they are hazardous substances. Accordingly, most used oil, even without a specific listing, would not be fully within the petroleum exclusion, irrespective of the listing.

Discussion

Because there is no definition of "petroleum" in CERCLA or any legislative history which clearly expresses the intended scope of this exclusion, there are several possible interpretations which could be given to this provision. However, we believe that our current interpretation, under which "petroleum" includes hazardous substances normally found in refined petroleum fractions but does not include either hazardous substances found at levels which exceed those normally found in such fractions or substances not normally found in such fractions, is most consistent with the statute and the relevant legislative history. Under this interpretation, the source of the contamination, whether intentional addition of hazardous substances to the petroleum or addition of hazardous substances by use of the petroleum, is not relevant to the applicability of the petroleum exclusion. The remainder of this memorandum explains in greater detail this interpretation and its legal basis, and responds to arguments raised in opposition to this interpretation.

The following is our interpretation of "petroleum" under CERCLA 101(14) and 104(a)(2), which we believe to be consistent with Congressional intent and the position which the Agency has taken on the scope of the petroleum exclusion thus far. First, we interpret this provision to exclude from CERCLA response and liability crude oil and fractions of crude oil, including the hazardous substances, such as benzene, which are indigenous in those petroleum substances. Because these hazardous substances are found naturally in all crude oil and its fractions, they must be included in the term "petroleum," for that provision to have any meaning.

Secondly, "petroleum" under CERCLA also includes hazardous substances which are normally mixed with or added to crude oil or crude oil fractions during the refining process. This includes hazardous substances the levels of which are increased during refining. These substances are also part of "petroleum" since their addition is part of the normal oil separation and processing operations at a refinery in order to produce the product commonly understood to be "petroleum."

Finally, hazardous substances which are added to petroleum or which increase in concentration solely as a result of contamination of the petroleum during use are <u>not</u> part of the "petroleum" and thus are not excluded from CERCLA under the

exclusion. 3/ In such cases, EPA may respond to releases of the added hazardous substance, but not the oil itself.

We believe that an interpretation of "petroleum" to include only indigenous, refinery-added hazardous substances is the interpretation of this provision which is most consistent with Congressional intent. The language of the provision, its explanation in the legislative history, and the Congressional debates on the final Superfund bill clearly indicate that Congress had no intention of shielding from Superfund response and liability hazardous substances merely because they are added, intentionally or by use, to petroleum products.

The language of the petroleum exclusion describes "petroleum" principally in terms of crude oil and crude oil fractions. This language is virtually identical to the language used in an earlier Superfund bill to define "oil." 4/ There is no indication in the statute or legislative history that the term "petroleum" was to be given any meaning other than its ordinary, everyday meaning. See Malat v. Riddell, 383 U.S. 569, 571 (1966) (words of a statute should be interpreted where possible in their ordinary, everyday sense). Petroleum is defined in a standard dictionary as

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3/ The mixing of two or more excluded petroleum substances, such as blending of fuels, would not be considered contamination by use, and the mixture would thus also be an excluded substance.

4/ See H.R. 85, 96th Cong., 2d Sess. §101(s) (as passsed by the House, September 1980) (""Oil" means petroleum, including crude oil or any fraction or residue therefrom"). H.R. 85 was designed principally to provide compensation and assess liability for oil tanker spills in navigable waters. As discussed below, the omission of this "oil spill" coverage under the petroleum exclusion was believed to be the most significant omission in terms of response to environmental releases under the final Superfund bill.

Although the bill containing the precursor to Section 101(14), S. 1480, does not have a definition of "petroleum", its accompanying report did explain the term "petroleum oil" in the context of the taxing provisions:

> The term "petroleum oil" as used in subsection 5 means petroleum, including crude petroleum and any of its fractions or residues other than carbon black.

S. Rep. No. 96-848, 96th Cong., 2d Sess. 70 (1980).

> an oily flammable bituminous liquid that may vary from almost colorless to black, occurs in many places in the upper strata of the earth, is a complex mixture of hydrocarbons with small amounts of other substances, and is prepared for use as gasoline, naphtha, or other products by various refining processes.

Webster's Ninth New Collegiate Dictionary 880 (1985). Thus, an interpretation of the phrase "petroleum, including crude oil or any fraction thereof" to include only crude oil, crude oil fractions, and refined petroleum fractions is consistent with the plain language of the statute. 5/

The only legislative history which specifically discusses this provision states that

> petroleum, including crude oil and including fractions of crude oil which are not otherwise specifically listed or designated as hazardous substances under subparagraphs (A) through (F) of the definition, is excluded from the definition of a hazardous substance. The reported bill does not cover spills or other releases strictly of oil.

S. Rep. No. 96-848, 96th Cong., 2d Sess. 29-30 (1980) (emphasis added). Thus, the petroleum exclusion is explained as an exclusion from CERCLA for spills or releases only of oil. The legislative history clearly contemplates that the petroleum

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5/ This distinction under the exclusion in Title I of CERCLA between petroleum as the substance that leaves the refinery and the hazardous substances which are added to it prior to, during or after use was also made by Congress in Title II, the revenue provisions or CERCLA. In Title II, Congress made a distinction between "chemicals", petrochemical feedstocks and inorganic substances, taxed in Subchapter B of Chapter 38 of Internal Revenue Code, and "petroleum", crude oil and petroleum products, taxed in Subchapter A. Section 211 of CERCLA. The list of taxed chemicals includes many of the contaminant hazardous substances typically found in used oil: arsenic, cadmium, chromium, lead oxide, and mercury. The term "petroleum products" was explained in the legislative history as including essentially crude oil and its refined fractions. H. Rep. No. 96-172, Part III, 96th Cong., 2d Sess. 5 (1980) (to accompany H.R. 85).

exclusion will not apply to mixtures of petroleum and other toxic materials since these would not be releases "strictly of oil".

The Congressional debates on the final compromise Superfund legislation provides further clarification of Congressional intent concerning the scope of the petroleum exclusion, both in terms of what this provision deleted from the bill and what it did not. First, the major concern expressed with respect to the final compromise bill was the omission of its oil spill jurisdiction due to the petroleum exclusion. See e.g. 126 Cong. Rec. H11787 (Rep. Florio) (daily ed. December 3, 1980); id. at H11790 (Rep. Broyhill); id. at H11792 (Rep. Madigan); id. at H11793 (Rep. Studds); id. at H11795 (Rep. Biaggi); id. at H11796 (Rep. Snyder). This omission was of concern because it was believed to leave coastal areas and fisheries vunerable to tanker spills of crude and refined oil, such as the wreck of the Argo Merchant, and offshore oil well accidents. 126 Cong. Rec. H11793 (Rep. Studds) (daily ed. December 3, 1980). See also 126 Cong. Rec. S10578 (proposed amendment to S1480 by Sen. Magnuson) (daily ed. August 1, 1980); id. at S10845 (proposed amendment to S1480 by Sen. Gravel) (daily ed. August 5, 1980). The omitted coverage of oil spills was believed to include approximately 500 spills per year, 126 Cong. Rec. H11796 (Rep. Snyder) (daily ed. December 3, 1980), far less than the number of contaminated oil releases each year.

However, it was clear that the omission of oil coverage was intended to include spills of oil only, and there was no intent to exclude from the bill mixtures of oil and hazardous substances. The remarks of Rep. Mikulski are typical of the general understanding of the effect of the petroleum exclusion in the final bill:

> The Senate bill is substantially similar to the House measure, with the exception that there is no oil title.
>
> I realize that it is disappointing to see no oil-related provision in the bill, but we must also realize that this is our only chance to get hazardous waste dump site cleanup legislation enacted. . . .
>
> Moreover, there is already a mechanism in place that is designed to deal with spills in navigable waterways. There is not, however, any provision currently in our law that addresses the potentially ruinous situation of abandoned toxic dump sites.
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> I, therefore, believe that it is imperative that we pass the Senate bill as a very important beginning in our attempt to defuse the ticking environmental time bomb of abandoned toxic waste sites.

Id. at H11796.

In addition, several speakers specifically identified such mixtures as releases not only covered by the legislation but releases to which the bill was addressed.

> Mr. Edgar ...
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> In my State, hazardous substances problems have been discovered at an alarming rate in recent years. In the summer of 1979, an oil slick appeared on the Susquehanna River near Pittston, Pa. When EPA officials responded under section 311 of the Clean Water Act, they learned that the slick contained a variety of highly poisonous chemicals in addition to the oil.
>
> Officials estimate that more than 300,000 gallons of acids, cyanide compounds, industrial solvents, waste oil and other chemicals remain at this site where they could be washed to the surface anywhere in a 10-square - mile surface.

Id. at H11798. See also 126 Cong. Rec. S14963 (daily ed. November 24, 1980) (Sen. Randolph) (contaminated oil slick). Other petroleum products containing hazardous substance additives intended to be addressed by the legislation include PCB's in transformer fluid, id. at S14963 (Sen. Randolph) and S14967 (Sen. Stafford), dioxin in motor fuel used as a dust suppressant, id. at S14974 (Sen. Mitchell), PCB's in waste oil, id. (Sen. Mitchell) 6/ and contaminated waste oil, id. at S14980 (Sen. Cohen). Accordingly, Congress understood the petroleum exclusion to remove from CERCLA jurisdiction spills only of oil, not releases of hazardous substances mixed with the oil.

There are two principal arguments which have been raised in opposition to this interpretation. First, the argument has been made that this interpretation narrows the petroleum exclusion to the extent that it has became virtually meaningless. As we have noted in previous opinions on this issue, an interpretation which emasculates a provision of a statute is strongly disfavored. Marsano v. Laird, 412 F.2d 65, 70 (2d Cir. 1969). However, this interpretation leaves a significant number of petroleum spills outside the reach of CERCLA. Spills or releases of gasoline remain excluded from CERCLA under the petroleum exclusion. As indicated by the legislative history for the 1984 underground storage tank

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6/ The illegal disposal of PCB's in North Carolina described by Senator Mitchell was a result of the spraying of 131,000 gallons of PCB-contaminated waste oil along a roadway. See 126 Cong. Rec. H9448 (daily ed. September 23, 1980).

legislation, leakage of gasoline from underground tanks appears to be the greatest source of groundwater contamination in the United States. 130 Cong. Rec. S2027, 2028 (daily ed. February 29, 1984) (Sen. Durenberger). In addition, spills of crude or refined petroleum are not subject to Superfund, as was frequently noted prior to its passage. See generally 126 Cong. Rec. H11786-H11802 (daily ed. December 5, 1980). Moreover, under this interpretation not all releases of used oil will be subject to CERCLA since used oil does not necessarily contain non-indigenous hazardous substances or hazardous substances in elevated levels. 7/ Although used oil is generally "contaminated" by definition, see e.g., RCRA Section 1005 (36), the impurities added by use may not be CERCLA hazardous substances.

A second argument which has been made opposing this interpretation is that Congress intended to include in the term "petroleum" all hazardous substances added through normal use of the petroleum substance. However, even if it were possible to determine in a response situation whether a hazardous substance was added intentionally or only through normal use or to determine what additions are "intentional", the legislative history is contrary to such a distinction. As noted above, the Senate Report explaining this provision states that it excludes releases or spills strictly of oil. This explanation expresses Congressional intent that releases of mixtures of oil and toxic chemicals, i.e. releases which are not strictly of oil, would be subject to CERCLA response authority. Releases of contaminated oil even if contaminated due to "normal use" are not releases strictly of oil.

Furthermore, the Congressional debates prior to passage clearly indicate an intent that contaminated oil would be subject to Superfund as several such releases were discussed as the focus of the legislation. Congress was concerned with the environmental and health effect of abandoned toxic waste sites, not whether the presence of such hazards was intentional or due to normal practices. In fact, one of the petroleum-hazardous substance mixtures most often mentioned during the debates was that of PCB contaminated oil, which is a type of contamination arguably resulting from the "normal use" of the oil in transformers. Accordingly, an interpretation of the petroleum exclusion which includes as "petroleum" hazardous substances added during use of the petroleum would not be consistent with Congressional intent.

7/ Data submitted to EPA by the Utility Solid Waste Activities Group et al. in Appendix C of their comments on the RCRA Used Oil listing, February 11, 1986.

Finally, although the Superfund Amendments and Reauthorization Act of 1986 (SARA) contains several provisions related to oil and oil releases, it did not amend the petroleum exclusion under CERCLA. Moreover, the new provisions concerning oil and oil releases and their legislative history do not indicate a Congressional intent inconsistent with this opinion.

The only discussion of "petroleum" in the Conference Report for SARA is in the context of defining the scope of the new petroleum response fund for leaking underground storage tanks under Subtitle I of the Resource Conservation and Recovery Act (RCRA). Subtitle I defines "petroleum" in a manner nearly identical to CERCLA. The Conference Report specifies that used oil would be subject to the response fund notwithstanding its contamination with hazardous substances. H. Rep. No. 99-962, 99th Cong., 2d Sess. 228 (1986). The Conference Report is not inconsistent with the Agency's position on "petroleum" under CERCLA since it merely specifies that the leaking underground storage tank (UST) response fund is applicable to tanks containing certain mixtures of oil and hazardous substances, as well as to tanks containing uncontaminated petroleum. In fact, the Report further states that the UST response fund must cover releases of used oil from tanks since "releases from tanks containing used oil would not rise to the priority necessary...for CERCLA response", id. (emphasis added), not because such releases would be entirely excluded from CERCLA jurisdiction. See also 132 Cong. Rec. S14928 (daily ed. October 3, 1986) (Senator Chaffee) (Nothing in Section 114, pertaining to liability for releases of recycled oil, "shall affect or impair the authority of the President to take a response action pursuant to Section 104 or 106 of CERCLA with respect to any release...of used oil or recycled oil"); 132 Cong. Rec. H9611 (daily ed. October 8, 1986) (Rep. Schneider) ("...the oil companies are rightfully assessed a significant share of the Superfund tax...Waste oils laced with contaminants have been identified at at least 153 Superfund sites in 32 States.").